APPEAL NO. 92092
APRIL 27, 1992

On February 3, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the evidence did not establish the necessary causal connection between the claimant's employment and his inguinal hernia, concluded that the claimant did not receive an injury that arose out of and in the course and scope of his employment with (employer), and denied claimant's claim for workers' compensation benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The appellant, claimant herein, contests certain findings of fact, the conclusion that he did not sustain a compensable injury, and the denial of benefits. He also requests that we consider a letter from his doctor which he obtained after the hearing. No response was filed to claimant's request for review.

DECISION

The hearing officer's decision is affirmed.

Claimant was diagnosed as having an indirect inguinal hernia in August 1991. He was 47 years of age at that time. Claimant contended in his response to the benefit review conference report and at the contested case hearing that his hernia resulted from repeated lifting and carrying of heavy objects during his employment as a part-time busboy for employer from April 1990 to August 1991. The employer is a private club which caters parties, wedding receptions, and other special events on its premises, as well as servicing a main dining room for its members. Claimant said that 500 hours of the 1300 hours he worked during his period of employment involved carrying objects, some of which he carried up and down stairs. Among the objects he lifted and carried were tables, chairs, portable bars, racks of place settings, and bus trays. He said that on occasion he had to carry by himself 100 pound tables, 15 or 20 in a row, down a staircase. He also said that on many occasions he carried, by himself, a 150 pound cast iron bar table down a staircase which he said put a tremendous amount of strain and stress on his body. At other times, he lifted and carried a 200 pound table with the help of only one coworker. The written statements of two coworkers confirmed the weights of the objects that were carried and that many of the objects were carried up and down the stairs. One coworker added that a rack of place settings weighed 15 pounds and that a stack of base plates weighed 25 pounds. Setting up for parties and other special events was almost a daily occurrence so that whenever claimant worked he would be involved in the lifting and carrying of tables and chairs as well as the lifting and carrying of place settings and bus trays for the main dining area. On one occasion, claimant said he and one coworker lifted a very large barbecue pit weighing between 400 and 500 pounds onto the back of a truck and then lifted it off the truck upon arrival at the location of the special event catered by the employer. Claimant did not specify the date that this occurred. However, his supervisor, JH, said it was on July 27, 1991. According to the supervisor, claimant next worked on August 2nd and 3rd, and then did not

work at employer's until August 16, 1991. No evidence was adduced in regard to claimant's work activities on August 2nd and 3rd.

Sometime around August 12, 1991, claimant noticed pain in his groin area one night while at home after eating a large meal. He had been babysitting his children prior to eating. On Tuesday, August 13, 1991, he noticed a "big bulge" in his groin area and made an appointment to see Dr. C on August 16, 1991. Claimant said Dr. C diagnosed a hernia and referred him to Dr. R whom he saw on August 27, 1991. No medical reports from Dr. C were in evidence. He said he went to work on August 16, 1991, and told his supervisor that he had a hernia and he was put on light duty for a few hours. That was the last day he worked for the employer. Claimant testified that he could not pinpoint one specific exertion at work which caused his hernia, nor a definite time at work when his hernia occurred.

During the period of time he worked as a part-time busboy for the employer, claimant was also a free-lance salesperson. He said his sales job involved mostly telephone work and showing prospective customers pictures of items he was selling. He said his sales job involved no strenuous work. He described his other activities during this period as playing chess, doing housework and some yardwork, and playing with his children.

Claimant's supervisor testified that claimant's busboy job involved extremely hard work and a great deal of lifting and carrying of a variety of objects, including large tables. He said claimant never reported to him a specific incident where he, claimant, felt sudden pain. The supervisor also said that on August 16, 1991, claimant told him he had a hernia and thought he got it at work. He said claimant did not give a specific time his hernia occurred, but that claimant said he got it from all the lifting and carrying he had done at work over the past years.

In a letter to carrier dated October 25, 1991, Dr. R stated:

> [Claimant] was in the office on 8/27/91 complaining of a discomfort in the left inguinal area. He stated that the discomfort and bulging in that area had been present for several weeks. He cannot give an exact time when it first appeared, but it happened during the time he was lifting heavy boxes while working at the [employer]. Upon examination the patient had a bulging in the left inguinal area which could easily be pushed back into the abdomen. I feel [claimant] has indirect inguinal hernia on the left.
>
> [Claimant] states that he did not have a hernia prior to working at the [employer]. During his work there, he lifted some very heavy objects and I can only surmise that his hernia was caused during this occupation.

Dr. R added that the hernia could be repaired and would require six weeks of healing. In another letter dated January 8, 1992, Dr. R stated:

A hernia is a protrusion of the peritoneum through a defect in the abdominal wall. In an inguinal hernia, this protrusion occurs at the point where the spermatic cord exits the abdomen.

A hernia may develop suddenly associated with pain and bulging. A hernia may also occur over a short period of time with repeated straining. Pain may or may not occur with either.

Dr. D stated in a letter dated January 13, 1992, that there was no evidence of a hernia when he performed a voluntary sterilization procedure on claimant in October 1987.

Claimant also introduced into evidence an excerpt from Saunders Encyclopedia & Dictionary of Medicine, Nursing, and Allied Health which relates in part that an inguinal hernia is often the result of increased pressure within the abdomen, whether due to lifting, coughing, straining, or accident, and that inguinal hernia accounts for about 75 percent of all hernias. It goes on to state that inguinal hernia begins usually as a small breakthrough. It may be hardly noticeable, appearing as a soft lump under the skin, no larger than a marble, and there may be a little pain. As time passes, the pressure of the contents of the abdomen against the weak abdominal wall may increase the size of the opening and, accordingly, the size of the lump formed by the hernia.

An excerpt from Encyclopedia of OSHA, which claimant also introduced into evidence, relates that there is a "hernia of weakness" or "disease hernia" and a "stress hernia" or "accidental hernia." The "hernia of weakness" is often the result of age and independent of the subject's work. It is without acute symptomatology and often without an immediate precipitating cause or following a slight effort such as an attack of coughing. Conversely, the much rarer "stress hernia" is the immediate result of a violent effort made whilst the body is badly positioned and has dramatic symptoms. It is further noted in the article that, generally, hernia is of mixed origin and that hernias are attributed to a wide variety of jobs which include heavy manual work, including lifting, carrying, and moving heavy objects, especially when these jobs are incidental to the main occupation. Also noted is that even a slight effort may suffice to produce a hernia in a sedentary worker with a weak abdominal wall.

The findings and conclusion contested on appeal are:

FINDINGS OF FACT

5.Claimant was not performing work for the employer at the time he noted pain and swelling in his groin.

6.Claimant could not identify a specific event or injury that caused the inguinal hernia.

7.The preponderance of the testimony and evidence does not establish the

necessary causal connection between the claimant's employment and the inguinal hernia.

CONCLUSIONS OF LAW

3.Claimant did not receive an injury that arose out of and in the course and scope of his employment for [employer].

Under the 1989 Act, a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act," and an "injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm," and includes occupational diseases. Article 8308-1.03(10) and (27). Unlike the prior workers' compensation law, the 1989 Act does not contain a specific provision relating to the compensability of hernia. Article 8306, Section 12b, which was enacted in 1917 (1917 Tex. Gen. Laws 269, 277-78, 35th Leg.) and repealed on the enactment of the 1989 Act (Acts 1989, 71st Leg., 2nd C.S., ch. 1) provided in pertinent part as follows:

Sec. 12b.Hernia. In all claims for hernia resulting from injury sustained in the course of employment, it must be definitely proven to the satisfaction of the board:

1.That there was an injury resulting in hernia.

2.That the hernia appeared suddenly and immediately following the injury.

3.That the hernia did not exist in any degree prior to the injury for which compensation is claimed.

4.That the injury was accompanied by pain.

In Larson's Workmen's Compensation Law, Vol 1B, §§ 39.71, 39.72, 39.73 (Matthew Bender & Co., Inc., New York, NY 1991), Professor Larson notes that 25 states have separate statutory tests governing the basic compensability of hernias and that in jurisdictions not having special hernia statutes, some of the same types of tests may appear as common-sense tests of causal connection. He also notes that the ultimate objective of these statutes is to distinguish nonindustrial congenital hernias from those definitely produced by trauma or effort at work. Professor Larson additionally notes that hernia may be treated as an occupational disease in some circumstances noting the case of Makowski v. Darling & Company, 18 A.D.2d 1120, 239 N.Y.S.2d 9 (1963) wherein the court affirmed without discussion the New York Workmen's Compensation Board's finding that a gradually developed hernia was an occupational disease, rather than an accidental injury. We note that the court in that case stated there was no controversy over the right of the claimant to death benefits. The controversy was over which of two carriers was liable for the award of

benefits.

Since the 1989 Act does not contain the separate statutory provision on hernia that was contained in the prior law, it is our opinion that the compensability of hernias should be determined as for other injuries that are not addressed in a separate statutory provision in the 1989 Act. In other words, there must be a compensable injury as defined by the 1989 Act. *See* Article 8308-1.03(10). For there to be an accidental injury, or an industrial accident, it has been held that there must be an undesigned, untoward event traceable to a definite time, place, and cause. Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972). Claimant admits that he cannot trace his hernia to an event occurring at a definite time and place, but insists the evidence establishes the cause of his hernia as his lifting and carrying activities at work. As previously noted, under the 1989 Act the term "injury" includes "occupational diseases" which term includes "repetitive trauma injury." Article 8308-1.03(27) and (36). A "repetitive trauma injury" means "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(39). Although claimant does not use the words "repetitive trauma injury" to describe his injury, it clearly appears to us that he claimed at the benefit review conference and contested case hearing, and is claiming on appeal, that his hernia resulted from repeated lifting and carrying activities at work that were physically traumatic and that occurred over time and arose out of and in the course and scope of his employment, and that he is, therefore, claiming he sustained a repetitive trauma injury. Considering that a repetitive trauma injury is an injury which may be compensable under the 1989 Act, and in view of the fact that the compensability of hernia is no longer governed by separate statutory tests, we conclude that the 1989 Act does not preclude as a compensable injury a hernia resulting from a repetitive trauma injury, provided that the requisite causal connection between the employment and the injury resulting in hernia is established. To recover workers' compensation benefits for a repetitive trauma injury, a claimant is required to prove causation by activities occurring on a job; he is not required to prove that the injury was caused by an event occurring at a definite time and place. Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 213 (Tex. 1988). To recover for a repetitive trauma injury one must not only prove that repetitious physical traumatic activities occurred on the job, but also prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105-107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

In Finding of Fact No. 6 the hearing officer found that claimant could not identify a specific event or injury that caused the hernia. This finding is supported by the evidence. However, as previously noted, a repetitive trauma injury does not require proof that the injury was caused by an event occurring at a definite time and place. Aranda, *supra*. The hearing officer also found in Finding of Fact No. 5 that claimant was not performing work for the employer at the time he noted pain and swelling in his groin. Although this finding is supported by the evidence, it is not necessarily controlling on the issue of whether claimant

sustained a compensable injury. Merely because an injury manifests itself at home does not make the injury noncompensable where the injury "had to do with" a claimant's work and the cause of the injury "originated at his work." Lujan v. Houston General Insurance Company, 756 S.W.2d 295, 297 (Tex. 1988). *See also* Texas Employers Insurance Association v. Duree, 798 S.W.2d 406, 411 (Tex. App.-Fort Worth 1990, no writ) wherein the court held that a 10-day interval between the claimant's injury and his discovery of a lump did not negate the sudden and immediate appearance of the hernia as a matter of law.

It appears to us that the hearing officer did not apply the law relating to repetitive trauma injury to claimant's claim and based Conclusion of Law No. 3--that claimant did not receive an injury that arose out of and in the course and scope of his employment--at least in part on Finding of Fact No. 6. To the extent Finding of Fact No. 6 addresses a "specific event," it is not relevant to the issue of a repetitive trauma injury, the type of injury upon which claimant's claim is based. Furthermore, Finding of Fact No. 5 is not necessarily dispositive due to the delayed action doctrine discussed in Lujan, *supra*, although it may be a relevant finding.

Notwithstanding our belief that the hearing officer did not to consider claimant's claim as one for repetitive trauma injury and our determination that the 1989 Act does not preclude from compensability a hernia resulting from repetitive trauma injury, we nevertheless determine that the hearing officer was correct in finding that the testimony and evidence did not establish the necessary causal connection between claimant's employment and his inguinal hernia. Further, our determination on that matter holds for claimant's claim even when viewed as one for repetitive trauma injury.

Although not intending in any way to be exhaustive on the matter of causation between employment and injury, we observe that in some cases evidence to establish a probable causal connection must come from expert testimony. In other cases a probable causal connection can be based on the evidence as a whole, usually consisting of expert testimony as to the possibility of causation supported by other evidence. In still other cases, a causal connection may be established by circumstantial evidence and lay testimony alone without supporting expert testimony. An example of a case requiring expert testimony to establish a "reasonable medical probability" of causation is Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). In that case, the claimant contended that the testimony and factual circumstances of the case created a "reasonable medical probability" of causation between his exposure to radiation and his subsequent development of cancer. The court determined that there was no sequence of events strong enough to establish a causal connection and that there was no evidence linking the radiation with the cancer other than the speculation and conjecture of laymen about an esoteric etiology science. The court stated that in the absence of factual circumstances of probability understandable to a jury, there must be some scientific testimony that can be interpreted as an inference of hypothetical probability. The expert testimony in that case was to the effect that the etiology of cancer is really unknown, and the doctor testified that the cancer "could have" been caused by radiation, but that there was

no way to determine the cause. The court held that the doctor's testimony was not evidence of causal connection between the claimant's cancer and radiation.

In Atkinson v. United States Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.), a case involving causal connection between the employee's exposure to ammonia gas and development by the employee of Addison's disease, the court stated that:

> In determining whether or not a showing of mere possibility and no more has been made, all of the pertinent evidence on the point must be considered. The fact that an expert medical witness, in speaking of cause and effect uses such expressions as "might cause," "could cause," "could probably cause," or phrases similar thereto does not preclude a jury finding of causal connection, provided there be other supplementary evidence supporting the conclusion. Causal connection is generally a matter of inference, and possibilities may often play a proper and important part in the argument which establishes the existence of such relationship. It is well settled that the medical expert in testifying as to a present or past physical condition, may express his opinion as to causal relationship in terms of possibility.

The court in Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494-495 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) explained that in workers' compensation cases the issues of injury and disability may be established by testimony of the claimant alone, even though such lay testimony is contradicted by the unanimous opinions of medical experts. An exception to that rule is when a subject is one of such a scientific or technical nature that the jury or court cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, and only the testimony of experts skilled in that subject has any probative value. The court noted that the cause, progression, and aggravation of diseases, and particularly of cancer, are such subjects.

Cases which hold that lay testimony and circumstantial evidence are sufficient to establish causation sometimes involve a prompt onset of symptoms following a specific event. *See* Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist.] 1988, no writ); Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist.] 1987, no writ). Other cases involve at least a sequence of events from which the trier of fact could properly infer without the aid of expert medical testimony that the employment caused the injury. *See* Morgan v. Compugraphic Corp, 675 S.W.2d 729 (Tex. 1984) (a personal injury suit); Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist.] 1980, no writ); Transport Insurance Company v. Campbell, 582 S.W.2d 173 (Tex. Civ. App.-Houston [1st Dist.] 1979, writ ref'd n.r.e.). In Northern Assurance Company of America v. Taylor, 540 S.W.2d 832 (Tex. Civ. App.-Texarkana 1976, writ ref'd n.r.e.) the court held that the jury was

entitled to conclude based upon the totality of the evidence, which did not include medical testimony of causation, that the injury resulting in hernia was job related where common experience and knowledge of the jury was sufficient to determine probability of causation of the employee's injury, *i.e.*, hernia resulting when claimant strained to rise from pick up truck in which he was riding at work, claimant felt sharp pain and immediately discovered a knot or bulge in the area of his groin.

Our review of the authorities cited herein and others concerning the issue of causation between employment and injury convinces us that there must be some expert testimony of probative value, either alone or together with lay testimony and circumstantial evidence, to establish causation between a hernia resulting from repetitive trauma injury and work activities in the circumstances presented in this case. In this case there was no prompt onset of symptoms following repetitious, physically traumatic work activities. *Compare* Texas Employers' Insurance Association v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied), a repetitive trauma case involving a back injury where there was evidence of the prompt onset of symptoms following the claimant's transfer to a low ironing board. We also believe that there is not a sequence of events strong enough from which the trier of fact could properly infer causation without the aid of expert medical testimony. Dr. R'S statement that he can only "surmise" that the hernia was caused in the performance of claimant's occupation, amounts to mere conjecture or a guess. We do not think that such conjecture, together with the lay testimony and circumstantial evidence presented in this case, is sufficient to establish a causal connection between claimant's hernia and his lifting and carrying activities occurring over a period of time at work.

We decline to consider the March 2, 1992, letter from Dr. R which claimant attached to his request for review, but which was not offered at the hearing. Our review of the evidence is limited to the record developed at the contested case hearing. Article 8306-6.42(1). Furthermore, claimant has not shown that the information in the document attached to his appeal was unknown or unavailable to him at the time of the hearing, and that due diligence would not have brought such information to light. *See generally* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Texas Workers Compensation Commission Appeal No. 91132, decided February 14, 1992.

The hearing officer's decision and order are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge